LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 22 1969
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 631

DAVID CARLINER, MARY ELLEN CARTER GROGAN, WILHELMINA VINCEL HETZEL, ARTHUR W. JACKSON, ROBERT GRAYSON McGUIRE, JR., and WILLIAM WARFIELD ROSS, Petitioners

v.

COMMISSIONER OF THE DISTRICT OF COLUMBIA, DISTRICT OF COLUMBIA COUNCIL, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID CARLINER
902 Warner Building
Washington, D. C.

HARRY HUGE
1832 Jefferson Place, N.W.
Washington, D.C.

ARTHUR W. JACKSON
715 G Street, N.W.
Washington, D. C.

REUBEN ROBERTSON
2234 Decatur Place, N.W.
Washington, D. C.
Attorneys for Petitioners

Of Counsel:
RALPH TEMPLE
National Capital Area Civil Liberties Education and Defense Fund
1424 Sixteenth Street, N.W.
Washington, D.C.

Washington, D. C. THIEL PRESS 202 393-0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTE AND EXECUTIVE ORDER INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	5
I. As to the Constitutional claims	5
II. As to jurisdiction	26
CONCLUSION	30
Appendix A, Opinion of the United States Court of Appeals for the District of Columbia Circuit	31
Appendix B, Judgment of the United States Court of Appeals for the District of Columbia Circuit	33
Appendix C, Judgment of the United States District Court for the District of Columbia	34

TABLE OF CASES

Aptheker v. Secretary of State, 328 U.S. 500, 514	22
Ashwander v. Tennessee Valley Authority, 297 U.S. 288	19
Avery v. Midland County, 390 U.S. 474	5, 6, 7, 8, 19, 27
Bailey v. Patterson, 369 U.S. 31, 33	26
Baker v. Carr, 369 U.S. 186	5
Balzac v. Puerto Rico, 258 U.S. 298	19
Bolling v. Sharpe, 347 U.S. 497	8, 9, 10, 11, 24
Boyd v. United States, 116 U.S. 616	13
Bradfield v. Roberts, 175 U.S. 291	11
Callan v. Wilson, 127 U.S. 540	11
Capitol Traction v. Hof, 174 U.S. 1	11
Carliner v. Board of Commissioners 265 F. Supp. 736 (D.D.C. 1967), vacated as moot	26

Page

Cipriano v. City of Houma, 395 U.S. 701 . . . . . 5, 6, 8

Clinton v. Englebrecht, 80 U.S. 434, 441 . . . . . 18, 19

District of Columbia v. Thompson, 346 U.S. 100, 109 11

Downes v. Bidwell, 182 U.S. 244, 260 . . . . . 19, 20

Ex Parte Cogdell, 342 U.S. 163 . . . . . fn. 26

Ex Parte Yarbrough, 110 U.S. 651, 663-665 8

Flast v. Cohen, 392 U.S. 83 . . . . . 28, 29

Fleming v. Nestor, 363 U.S. 603 28

Gomillion v. Lightfoot, 364 U.S. 339, 344-345 . . . . . 5, 6

Gray v. Saunders, 372 U.S. 368 8

Griswold v. Connecticut, 381 U.S. 479, 488, 492-493 . . . . . 10, 22

Grossjean v. American Press Co., 297 U.S. 233 13

Guinn v. United States, 238 U.S. 347 8

Harman v. Forssenius, 380 U.S. 528 8

Harper v. Virginia Bd. of Election, 383 U.S. 663, 685 . . . . . 8, 24

Hobson v. Tobriner, 225 F. Supp. 295, 297, 299 (D.D.C.) petition for mandamus denied, sub nom. Hobson v. Gasch, (D.C. Cir. No. 20,838) cert. denied, 386 U.S. 914 . . . . . 7, 8, 9, 10, 12, 23, 26

International Ladies Garment Workers Union v. Donnelly, 304 U.S. 243, 250 28

Jameson & Co. v. Morgenthau, 307 U.S. 171, 173, 174 28

Kennedy v. Mendoza-Martinez, 372 U.S. 144 28

Kent v. Dulles, 357 U.S. 116, 125, 127-129 . . . . . 22, 24, 25, 27

Kramer v. Union Free School District, 395 U.S. 621 . . . . . 5, 6, 7, 8, 23

Kramer v. Union Free School District, 259 F. Supp. 164 (D.C.E.D. N.Y.), petition for writ of mandamus denied sub nom. Davis v. Union Free School District, 385 U.S. 807; reversed 379 F.2d 491; 282 F. Supp. 70, reversed 395 U.S. 621 . . . . . fn. 27

Page

Marcus v. Search Warrant, 367 U.S. 717 13

Myers v. United States, 272 U.S. 52, 136 18

Moody v. Flowers, 387 U.S. 97 5

NAACP v. Alabama, 377 U.S. 288, 307 22

Nixon v. Condon, 286 U.S. 73 8

O'Donoghue v. United States, 289 U.S. 516 ..... 9, 11

People v. Hurlbut, 24 Mich. 44 (1871) 15, 21

Phillips v. United States, 312 U.S. 246, 250-251 28

Rassmussen v. United States, 197 U.S. 516 19

Reynolds v. Sims, 377 U.S. 533 ..... 5, 6, 8, 9, 24

Sailors v. Kent County Board of Education, 387 U.S. 105, 109, 110 ..... 5, 7

Schneider v. Rusk, 372 U.S. 224, 377 U.S. 163 ..... 26, 27, 29

Schneider v. Smith, 390 U.S. 17 25

Schneider v. State, 308 U.S. 147, 161 ..... 22, 24

Shapiro v. Thompson, 394 U.S. 618 ..... 4, 8, 9, 11 23, 24, fn. 26

Shelton v. Tucker, 364 U.S. 479, 488 22

Smith v. Albright, 321 U.S. 649 8

Stafford v. Texas, 379 U.S. 476 13

Stoutenburg v. Hennick, 129 U.S. 141, 147 19

United Public Workers v. Mitchell, 330 U.S. 75, 94-96 ..... 9, 10, 20

United States v. Classic, 313 U.S. 299, 314-315 8

United States v. Guest, 383 U.S. 745, 758 9

United States v. Moreland, 258 U.S. 433 11

United States v. Robel, 389 U.S. 258 22

Wesberry v. Sanders, 376 U.S., 17-18, 22-26 ..... 6, 7, 8, 9, 12, 22

Williams v. Rhodes, 393 U.S. 23, 30 24

Wolf v. Colorado, 338 U.S. 25, 27 9

Wright v. Davidson, 181 U.S. 371 ..... 9, 11

Yick Wo v. Hopkins, 118 U.S. 363 ..... 5, 9, 23

Page

Zemel v. Rusk, 381 U.S. 1 29

Zwickler v. Koota, 389 U.S. 241 22

Legislative History, Treatises and Other Authorities:

Annals of Congress, 1st Cong. 439 . . . . . 10, 11

Annals of Congress, 6th Cong. 2d Sess. 723 17

Annals of Congress, 7th Cong. 2nd Sess. 610 18

Carter, The Territorial Papers of the United States 18

The Federalist, No. 43 (Madison) 15

Glassie, Testimony before House Judiciary Committee, Hearings on H. Joint Res. No. 8, 70th Cong. 1st Sess. p. 72 (1928) 14

Howard, Magna Carta, Text and Commentary, p. 38 1964 13

Jefferson, Writings of Thomas Jefferson, Vol. 3, pp. 59, 60-61 (Mem. ed. 1903) 16

Journals of the Continental Congress, 1774-1789, pp. 603-604 15

Kenney, Approaches to Local Government in the District of Columbia, 1789-1820 13

McKechnie, Magna Carta, pp. 240-248 13

McQuillan, Municipal Corporations pp. 324-326 (3rd ed.) 14

Padover, Thomas Jefferson and the Nation's Capitol, pp. 42-48 16

Pollock & Maitland, History of English Law, Vol. I, pp. 641-658 13

Rossiter, Seedtime of the Republic: The Origin of the American Tradition of Political Liberty, p. 16, 1953 13

S. Rep. 572, 44th Cong. 2d Sess. pp. 14-15 (1877) 21

Constitutional, Legislative and Administrative Provisions:

U.S. Constitution, Art. I, sec. 2 . . . . . 8, 12

U.S. Constitution, Art. I, sec. 4 8

U.S. Constitution, Art. I, sec. 8(17) 10, 18

Page

U.S. Constitution, Art. IV, sec. 3(2) 18

U.S. Constitution, Amend. V 8, 9

U.S. Constitution, Amend. IX 9, 11, 20

U.S. Constitution, Amend. X 2, 10, 11, 12, 20

U.S. Constitution, Amend. XIV 8, 24

U.S. Constitution, Amend. XV 8

U.S. Constitution, Amend. XXIII 23

U.S. Constitution, Amend. XXIV 8

Northwest Ordinances, 1784, 1785, 1787 18

Reorganization Act of 1949, 5 U.S.C. 901 et. seq 3, 24, 25, 28

Passport Act of 1926, 22 U.S.C. 211a 25

28 U.S.C. 1254(1) 1

28 U.S.C. 2282, 2284 . . . . . 26, 28

U.S. Statutes At Large, Vol. 1, p. 139 17

U.S. Statutes At Large, Vol. 2, p. 103 17

U.S. Statutes At Large, Vol. 2, p. 195 17

U.S. Statutes At Large, Vol. 2, p. 721 17

U.S. Statutes At Large, Vol. 3, p. 582 18

U.S. Statutes At Large, Vol. 9, p. 223 18

U.S. Statutes At Large, Vol. 16, p. 419 . . . . . 17, 20

U.S. Statutes At Large, Vol. 18, p. 116 . . . . . 17, 20

U.S. Statutes At Large, Vol. 20, p. 102 21

Reorganization Plan No. 3 of 1967, H. Doc. 132, 90th Cong. 1st Sess. 3, 4, 24, 28

District of Columbia Code, Title 11, Sec. 521 1

District of Columbia Code, Sec. 1-1101 . . . . . 23, 24

Maryland Declaration of Rights, I D.C. Code p. xx 20

Laws of Maryland, Vol. 2, c. 23 (1789) (Kilty 1800) 17, 20

Laws of Virginia, Vol. 10, c. 25 172 (Hening 1822) 17

Virginia Collection of Acts in Force 29, 91, 189, 261 (Davis 1794) 17

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. _____

DAVID CARLINER, MARY ELLEN CARTER GROGAN, WILHELMINA VINCEL HETZEL, ARTHUR W. JACKSON, ROBERT GRAYSON McGUIRE, JR., and WILLIAM WARFIELD ROSS, Petitioners

v.

COMMISSIONER OF THE DISTRICT OF COLUMBIA, DISTRICT OF COLUMBIA COUNCIL, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming a judgment of the District Court.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported and is set forth in Appendix A at pp. 31-32. The District Court entered no opinion (App. C).

JURISDICTION

The judgment of the Court of Appeals was entered on June 24, 1969 (App. B). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a complaint which alleges that the citizens of the District of Columbia have been deprived of municipal suffrage in violation of the Fifth and Tenth Amendments states a cause of action and a substantial constitutional question.
2. Whether Sections 201(b) and 301(b) of Reorganization Plan No. 3, which vest the power to appoint the Commissioner and the members of the District of Columbia Council in the President, are in conflict with the Fifth Amendment.
3. Whether the power to choose the officers of their local government is not a "power reserved to the people" of the District of Columbia within the meaning of the Tenth Amendment.
4. Whether the Reorganization Act may be construed to deny the citizens of the District of Columbia the right of local suffrage.
5. Whether a complaint, raising the constitutional questions set forth above, which seeks an injunction to restrain the enforcement of the pertinent provisions of the Reorganization Plan, is within the jurisdiction of a single-judge or a three-judge court.

STATUTE AND EXECUTIVE ORDER INVOLVED

The Reorganization Act of 1949 provides in pertinent part at 5 U.S.C. 904:

> "A reorganization plan transmitted by the President under section 903 of this title—
>
> * * *
>
> (2) may provide for the appointment and pay of the head and one or more officers of an agency (including an agency resulting from a consolidation or other type of reorganization) if the President finds, and in his message transmitting the plan declares, that by reason of a reorganization made by the plan the provisions are necessary. The head so provided may be an individual or may be a commission or

board with more than one member. In case of such an appointment, the term of office may not be fixed at more than 4 years, the pay may not be at a rate in excess of that found by the President to be applicable to comparable officers in the executive branch, and, if the appointment is not to a position in the competitive service, it shall be by the President, by and with the advice and consent of the Senate, except that in the case of an officer of the government of the District of Columbia, it may be by the Board of Commissioners or other body or officer of that government designated in the plan;"

Reorganization Plan No. 3 of 1967 provides at pertinent part (H. Doc. 132, 90th Cong. 1st Sess. 1967):

Section 201(b):

"The Council shall be composed of a Chairman of the Council, a Vice Chairman of the Council, and seven other members, all of whom shall be appointed by the President of the United States, by and with the advice and consent of the Senate. At the time of his appointment each member of the Council shall be a citizen of the United States, shall have been an actual resident of the District of Columbia for three years next preceding his appointment, and shall during that period have claimed residence nowhere else. The Council shall be nonpartisan and no more than six of its members shall be adherents of any one political party. Appointments of the Council shall be made with a view toward achieving a Council membership which will be broadly representative of the District of Columbia community."

Section 301(b):

"The Commissioner shall be appointed by the President of the United States, by and with the advice and consent of the Senate."

STATEMENT

Petitioners, each citizens and qualified voters in the District of Columbia, brought a class action in the District Court below on behalf of themselves and of other similarly situated citizens of the District of Columbia, to obtain a judgment declaring that those sections of Reorganization Plan No. 3

of 1967 which vest specified powers in the respondents are in conflict with the 5th and the 10th Amendments to the Constitution. Petitioners sought an injunction to restrain the respondents from exercising the powers vested in them by Reorganization Plan No. 3. The respondents are the Commissioner of the District of Columbia, appointed by the President of the United States pursuant to Section 301 (b) of Reorganization Plan No. 3 of 1967, and the District of Columbia Council and its individual members, appointed by the President of the United States pursuant to Section 201(b) of the Reorganization Plan.

Respondents moved to dismiss the complaint, or alternatively, there being no genuine issues of material fact, for summary judgment. Petitioners opposed the motion to dismiss and cross moved for summary judgment. The District Court denied both motions for summary judgment and instead granted respondents' motion to dismiss.

On appeal to the Court of Appeals below, that Court sua sponte raised the question "whether the appeal was properly before" it, "inasmuch as the case had not been heard in the first instance by the three-judge District Court." (Appendix A, p. 32).

Three issues were involved in the jurisdictional question posed by the Court of Appeals: (1) whether the challenge of the Reorganization Plan involved a challenge of an "Act of Congress" for the purposes of the three-judge court act, 28 U.S.C. 2282, 2284; (2) whether, if involving an act of Congress, the issue has only local applicability not cognizable under 28 U.S.C. 2282; and (3) whether the constitutional claims are insubstantial.

The opinion of the District of Columbia Circuit passed over the first question, cited *Shapiro v. Thompson*, 394 U.S. 618, as to the second question, and based its holding to affirm the dismissal of the complaint in the District Court upon the sole ground that the constitutional claims raised are insubstantial.

REASONS FOR GRANTING THE WRIT

I. As to the constitutional claims

1. In *Sailors v. Kent County Board of Education*, 387 U.S. 105, 109-110, this Court reserved the question "whether a state may constitute a local legislative body through the appointive rather than the elective process."

This case presents the question whether the Congress may, consistent with the Constitution, require that the City Council and the Mayor-Commissioner of the District of Columbia be appointed by the President of the United States rather than elected by the citizens of the District of Columbia.

2. That this issue is of substantial importance is indicated not only by the reservation of the question in *Sailors*, but by the series of decisions of this Court dealing with the right to vote for municipal officials. See *Gomillion v. Lightfoot*, 364 U.S. 339; *Moody v. Flowers*, 387 U.S. 97; *Avery v. Midland County*, 390 U.S. 474; *Kramer v. Union Free School District*, 395 U.S. 64; and *Cipriano v. City of Houma*, 395 U.S. 701.

3. The ruling of the court below that the constitutional claims raised by the complaint are "insubstantial", and, indeed, fail to state a cause of action is in clear conflict with what is by now a settled and well defined position of this Court.

Baker v. Carr, 369 U.S. 186, established that the issue raised in the complaint is justiciable. In *Reynolds v. Sims*, 377 U.S. 533, 562, the Supreme Court stated the judicial obligation in determining complaints which allege a denial of the right to vote:

> "Almost a century ago, in *Yick Wo v. Hopkins*, 118 U.S. 363, the Court referred to the 'political franchise of voting' as a 'fundamental political right because preservative of all rights', 118 U.S. at 370 . . . Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of the citizens to vote must be carefully and meticulously scrutinized."

This Court held there as to a complaint, not dissimilar to the allegation here that "qualified voters in the District of Columbia" have been entirely prohibited from voting for members of their city council and for their mayor-commissioner, that:

> "It could hardly gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislatures." *Ibid.*

See also *Wesberry v. Sanders*, 376 U.S. 1, 17, 18 which observed:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." 376 U.S. 17-18.

The fact that the complaint here deals with the right to vote in municipal elections, as distinguished from elections for members of state legislatures or of the House of Representatives, of course, does not make a difference. In *Gomillion v. Lightfoot*, 364 U.S. 339, which reversed a dismissal of a claim that Negroes were barred from the right to vote in municipal elections, the Supreme Court expressly held that "legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the Constitution", 364 U.S. at 344, 345 See also *Avery v. Midland County*, 390 U.S. 474, which applied the doctrine of *Reynolds v. Sims* to election of officials in cities, towns, and counties; *Kramer* v. *Union Free School District*, 395 U.S. 621; and *Cipriano* v. *City of Houma*, 395 U.S. 701.

4. The decisions of this Court have heretofore focused upon the distinctions between citizens who are granted the franchise rather than upon differentiations in determining

which organ of government shall be chosen by the electorate Cf. *Sailors v. Kent Board of Education*, 387 U.S. 105 and *Avery v. Midland County*, 390 U.S. 474.

The latter issue, posing the question reserved in *Sailors*, is one of particular importance at this time in view of the attention being given to the need for restructuring municipal governments.

In *Sailors v. Kent*, 387 U.S. 105, this Court observed that "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet urban conditions. We see nothing in the Constitution to prevent experimentation". (At 110). See also *Avery v. Midland County*, 390 U.S. 474, 485.

This case presents the question whether such experimentation may be conducted in a manner which deprives citizens of "having a voice in the election of those who make the laws under which, as good citizens (they) must live." *Wesberry v. Sanders*, 376 U.S. 1, 17.

This issue is underscored here by the fact that the citizens of the District of Columbia are denied any voice in the Congress which makes their laws, and that its government has been plainly and deliberately "structured (so that it does not) . . . represent fairly all of the people", or indeed, any of the people. (See *Kramer v. Union Free School District*, 395 U.S. at 628, and dissenting opinion, 395 U.S. at 639.)

5. A further and undoubtedly the critical question raised by the decision below is the nature of the rights which flow to the citizens of the District of Columbia under the Bill of Rights.

The District of Columbia Circuit based its decision upon the ruling in *Hobson v. Tobriner*, 255 F. Supp. 295 (D.D.C. 1966) petition for mandamus denied sub nom. *Hobson v. Gasch*, (D.C. Cir. No., 20,838), cert. denied 386 U.S. 914. In that decision, a single-judge District Court, without the benefit of briefs or oral argument by the plain-

tiffs there (See *Hobson v. Gasch*, Petition for Writ of Certiorari, October Term, 1966, No. 916, p. 6.), held that the "caveats" to the power of the Congress to legislate for the District of Columbia did not embrace the right to suffrage but "appear to be . . . only those rights of citizens which flow from the Constitution to all citizens" (at 299) and gave judicial cognizance only to trial by jury, presentment by grand jury and undefined "protections of due process of law" (at 297).

A substantial question thus raised by the decision below is whether suffrage is a right which flows under the 5th Amendment to those citizens who are not afforded this right under other provisions of the Constitution.

a. This Court has never expressly held that the right to vote is afforded the protection of the 5th Amendment. Voting in federal elections has been affirmed under Article I, Section 2 of the Constitution, *Wesberry v. Sanders*, 376 U.S. 1, 17 and under Article I, Section 4, *United States v. Classic*, 313 U.S. 299, 314-315, and *Ex Parte Yarbrough*, 110 U.S. 651, 663-665. It has been protected by the 24th Amendment, *Harman v. Forssenius*, 380 U.S. 528. Suffrage in state, as well as all other elections, is explicitly assured by the 15th Amendment, *Guinn v. United States*, 238 U.S. 347, and implicitly by the due process and equal protection clauses of the 14th Amendment, *Nixon v. Condon*, 286 U. S. 73, *Smith v. Allright*, 321 U.S. 649, *Baker v. Carr*, 369 U.S. 186, *Gray v. Saunders*, 372 U.S. 368, *Reynolds v. Sims*, 377 U.S. 533, *Harper v. Virginia Bd. of Election*, 383 U.S. 663, *Avery v. Midland County*, 390 U.S. 474 *Kramer v. Union Free School District*, 395 U.S. 621, and *Cipriano v. City of Houma*, 395 U.S. 701.

Yet it seems scarcely necessary to argue that the right to vote, including the right to vote in municipal elections in the District of Columbia, is a liberty within the meaning of the due process clause of the 5th Amendment. Compare *Bolling v. Sharpe*, 347 U.S. 497 and *Shapiro v. Thompson*, 394 U.S. 618.

United Public Workers v. Mitchell, 330 U.S. 75, 94-96, assumes that "political rights" are protected within the 5th Amendment. *Yick Wo v. Hopkins*, 118 U.S. 363, 370, expressly relied upon in *Reynolds v. Sims*, 377 U.S. 533, 562, regards voting as "preservative of all rights". *Wesberry v. Sanders*, 376 U.S. 1, 17, 18, states that "no right is more precious". If, as the Supreme Court observed in *Wolf v. Colorado*, 338 U.S. 25, 27, the Fifth Amendment encompasses "all those rights which the courts must enforce because they are basic to our free society", then surely none can doubt that the right to suffrage is the most fundamental of all.

The doubt which nonetheless the decision below has created should be removed by this Court.

b. A collateral question, which is of profound importance to the inhabitants of the District of Columbia, is raised by the holding in *Hobson v. Tobriner*, accepted by the Court below, that local suffrage is excluded from the protection of the 5th Amendment because it has not been expressly identified as a right "which flows from the Constitution to all citizens".

This view seems clearly in conflict with the decisions of this Court bearing upon the rights of the inhabitants of the District of Columbia. Thus the fact that the right to travel "finds no explicit mention in the Constitution", *United States v. Guest*, 383 U.S. 745, 758 did not preclude this Court from striking down, upon the basis of this Constitutional right, a residence requirement for receiving welfare assistance in *Shapiro v. Thompson*, 394 U.S. 618.

See also *Wright v. Davidson*, 181 U.S. 371; *O'Donoghue v. United States*, 289 U.S. 516; and *Bolling v. Sharpe*, 347 U.S. 497.

The court's holding below also denies the explicit language of the Ninth Amendment: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people".

As Mr. Justice Goldberg observed in his concurring opinion in *Griswold v. Connecticut,* 381 U.S. 479, 488, 492-493, "the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."

In *United Public Workers v. Mitchell,* 330 U.S. 75, 94-95, this Court has already held in effect that the right to vote is a right within the meaning of the Ninth Amendment and a power reserved to the people within the meaning of the Tenth Amendment. In dealing with the right of a federal government employee to take "active part in political campaigns" a right which is certainly not superior to the right to vote itself, the Court declared:

> "We accept appellant's contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments are involved . . . The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon the rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. . ." (330 U.S. 75, 93-96).

It is no answer to the inquiry directed by *United Public Workers* to justify the deprivation of municipal suffrage for the citizens of the District of Columbia upon the basis of the "grant of power" to the Congress to "exercise exclusive legislation" over the District of Columbia by Article I, Section 8, Clause 17 of the Constitution, as the opinion in *Hobson v. Tobriner* suggests.

As originally drafted, the Ninth Amendment offered by James Madison provided (I Annals of Congress 439, June 8, 1789):

> "The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, *or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers*, or as inserted merely for greater caution . . ." (emphasis supplied).

The decisions of the Supreme Court with regard to rights of citizens of the District of Columbia make it clear that the power granted to the Congress over the District of Columbia does not authorize the infringement either of rights "reserved by the Ninth and Tenth Amendments" or of rights enumerated in the eight other Amendments in the Bill of Rights.

Thus the residents of the District may not be deprived of First Amendment rights, *Bradfield v. Roberts*, 175 U.S. 291; of trial by jury, *Callan v. Wilson*, 127 U.S. 540 and *Capitol Traction Co. v. Hof*, 174 U.S. 1; or presentment by grand jury, *United States v. Moreland*, 258 U.S. 433; or the various protections afforded by due process, *Wright v. Davidson*, 181 U.S. 371, *O'Donoghue v. United States*, 289 U.S. 516, and *Bolling v. Sharpe*, 347 U.S. 497, including the right to receive welfare assistance, *Shapiro v. Thompson*, 394 U.S. 618.

Nor does the fact that the power vested in Congress is "exclusive" add to its authority to trench upon freedoms otherwise protected by the Constitution. In *District of Columbia v. J. R. Thompson, Inc.*, 347 U.S. 100, 109, the Supreme Court explored the meaning of the "exclusive" clause and stated:

> ". . . It is clear from the history of the provision that the word 'exclusive' was employed to eliminate any possibility that the legislative power of Congress over the District was to be concurrent with that of the ceding states."

The decision of the court below thus bears not only upon the question of suffrage for the inhabitants of the District of Columbia but upon any right which is not set forth in explicit terms in the Constitution. Apart from the issue of

municipal suffrage, it warrants review by this Court so that the Constitutional bounds of the Congressional jurisdiction over the District of Columbia may be determined.

c. An additional question raised here, but not in *Hobson v. Tobriner*, is the effect of the 10th Amendment upon the powers of the people of the District of Columbia. That this issue is neither frivolous nor a makeweight appears both from the decisions of this Court and from the pages of history.

In *Wesberry v. Sanders*, 376 U.S. 1, 17-18, this Court construed the term "by the people of the several states", which appears in Article I, Section 2 of the Constitution, a term which is analogous to the clause in the Tenth Amendment.

Against the contention that the Constitution reposed power in the States to determine the qualifications for the elections of members of the federal House of Representatives (see dissenting opinion, 376 U.S. 20, 22-26), the majority opinion of the Court held:

> "We do not believe that the Framers of the Constitution intended to permit . . . the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the people', a principle tenaciously fought for and established at the Constitutional Convention".

If our "fundamental ideas of democratic government" and the historical context of the phrase "people of the several states" require the application of the one-man one vote doctrine to the election of the members of the House of Representatives, the right of local suffrage stands on no less firm ground.

The meaning intended by the Founding Fathers to the great phrases in the Bill of Rights is usually determined, of

course, against the backdrop of English constitutional history. See *Boyd v. United States*, 116 U.S. 616, *Grossjean v. American Press Co.*, 297 U.S. 233, 250, *Marcus v. Search Warrant*, 367 U.S. 717, *Stafford v. Texas*, 379 U.S. 476.

History establishes that prime among these rights was that of municipal suffrage. Before the establishment of the American Colonies, Englishmen had achieved the political right of local self-government in the Magna Carta. See Chapter 13, Magna Carta, A.E. Dick Howard, "Magna Carta, Text and Commentary," p. 38, Magna Carta Commission, Charlottesville, Virginia (1964), which provides: "The City of London shall have all her ancient liberties and customs. Moreover, we will and grant that all other cities, boroughs, towns, and ports shall have all their liberties and free customs". Those liberties included that of choosing the mayor and aldermen who enacted and enforced local legislation. See McKechnie, Magna Carta, pp. 240-248; and Pollock and Maitland, History of English Law, I, 66, pp. 641-656.

Local self-government was transplanted and reinforced within the Colonies prior to the American revolution. See Marion L. Kenney, *Approaches to Local Government in the District of Columbia*, 1789-1820 (See R.I. J.A. 11-51), in which the author collates the contemporaneous materials. These show the development of local self-government in the colonies, the "emergence from the townships of the doctrine of the sovereignty of the people", and the express understanding and agreement of the authors of the Constitution that the seat of government would possess suffrage for control over its municipal affairs. (R.I. J.A. 11, 23).

As Kenney states, "From whatever state the (Constitutional) Convention delegates came, they had, one and all, lived in communities which accepted as normal the idea of self-governing municipalities incorporated originally under colonial governments, and, since the Declaration of Independence, under state legislatures." (R. J.A. 11).

See also Clinton L. Rossiter, "Seedtime of the Republic: The Origin of the American Tradition of Political Lib-

erty", 1953, p. 16, reviewing the development of political power in the towns, parishes, counties, and boroughs in the American colonies, has observed, "Self-government was doubly the rule in colonial America."

This view is reflected in McQuillan, "Municipal Corporations", Section 1.91, pp. 324-326 (3rd edition), which states:

> "Our country was conceived in the theory of local self-government, and from the beginning, political power has been exercised by citizens of the various local communities as local communities. Having been so dedicated by long practices, local self-government has come to be regarded as the most important feature in our system."

See also the opinion of Judge Cooley, the celebrated constitutional authority, in the leading case of *People v. Hurlbut*, 24 Mich. 44, 9 Am. St. R. 103:

> "The constitution (of Michigan) has been adopted in view of a system of local self-government, well understood and tolerably uniform in character, existing from the very earliest settlement of this country, never for a moment suspended or displaced, and the continued existence of which is assumed. . ." 24 Mich. at 98."

And at 102: "Our traditions, practices, and expectations have all been in one direction. . . . (They have) . . . included the power to choose in some form the persons who are to administer the local regulations."

This has been the view also of the Department of Justice. In hearings on House Joint Resolution 18 to provide for national representation of the District of Columbia in Congress, Henry H. Glassie, testifying for the Attorney General, declared: ". . .What was the claim of the Americans to full participation in the Government before the Revolution? Participation in local government? Not at all. They had that. It was participation in that sovereign imperial parliament which made the law." Hearings on House Joint Resolution No. 18, House Committee on the Judiciary, 70th Cong., 1st Sess., 1928, p. 72.

That the authors of the Constitution accepted the principle of local self-government for the "seat of government" appears from the historical materials relating to the establishment of the District of Columbia.

A committee, whose members included James Madison, dealing with the jurisdiction which Congress should have "in the place of their permanent residence", reported a resolution that Congress should have "exclusive jurisdiction", amplified by a motion by Madison that the seat of government "ought to be entirely exempted from the authority of the States ceding the same and the organization and administration of the powers of government within the said District, *concerted* between Congress and the inhabitants thereof" (emphasis supplied). A further resolution was presented by Arthur Lee which provided that "the people inhabiting within said territory should enjoy the privilege of trial by jury and of being governed by representatives of their own selection". See Journals of the Continental Congress, 1774-1789, pp. 603-604, Sept. 22, 1783.

During the debates on the ratification of the Constitution, Madison, discussing the establishment of a federal district at the seat of government in his famous essay in the Federalist papers, No. 43, declared:

> ". . .they (the inhabitants of the district) will have had their voice in the election of the government, which is to exercise authority over them; ...a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them. . . . . *The Federalist*, No. 43.

While not addressed to the question whether the citizens of the "seat of government" would continue to exercise suffrage under the Constitution, Jefferson, as Secretary of State, had occasion to advise President Washington whether to veto the bill to transfer the "seat of government" to the Potomac. In the course of that opinion, the precise question being whether Congress, without the Executive, could transfer the seat of government, Jefferson observed in lan-

guage no less applicable to the inhabitants of the seat of government than to Congress itself:

> "Every man, and every body of men on earth, possesses the right of self-government. They receive it with their being from the hand of nature. Individuals exercise it by their single will; collections of men by that of their majority; for the law of the *majority* is the natural law of every society of men. When a certain description of men are to transact together a particular business, the times and places of their meeting and separating, depend on their own will; they make a part of the natural right of self-government. This, like all other natural rights, may be abridged or modified in its exercise by their own consent, or by the law of those who depute them, if they meet in the right of others; but as far as it is not abridged or modified, they retain it as a natural right, and may exercise them in what form they please, either exclusively by themselves, or in association with others, or by others altogether, as they shall agree. . . ." See Writings of Thomas Jefferson, Memorial Edition, 1903, Vol. III, 1903, pp. 59, 60-61.

That Jefferson understood his views as to the right of self-government to apply to the District of Columbia appears expressly in his "Opinion Relative to Locating the 10-Mile Square for the Federal Government and Completing the Federal City", March 11, 1791, in which he referred to the formation of a "town legislature" for the District. See Padover, Thomas Jefferson and the Nation's Capital, pp. 47-48.

In November, 1800 when Congress met in Washington for the first time, President Adams addressed it regarding the problem of the government of the District:

> "It is with you, gentlemen to consider whether the local jurisdiction over the District of Columbia shall immediately be exercised. If in your opinion this important trust ought now to be executed, you can not fail to view the future probable situation of the

> territory, for the happiness of which you are now to provide. You will consider it as the capital of a Great Nation, advancing with unexampled rapidity—in the arts, in commerce, in wealth and in population, and possessing within itself, those energies and resources which, if not thrown away or lamentably misdirected, secure to it a long course of prosperity and *self-government.*" Annals of Congress, 6th Cong. 2nd Sess., p. 723, Nov. 22, 1800. (Emphasis supplied.)

The fact is, of course, that the inhabitants of the District of Columbia retained local suffrage from the very beginning of its establishment as the "seat of government" until 1874. The town of Georgetown, with municipal suffrage accorded to its citizens, was incorporated in 1789 prior to the adoption of the Bill of Rights. 2 Laws of Maryland, c. 23 (1789) (Kilty 1800). The town and county of Alexandria, which formed a part of the original cession of land for the District of Columbia, each possessed the right of local suffrage at the time of cession. See Virginia Collection of Acts in Force 29, 91, 189, 261 (Davis 1794) and 10 Laws of Virginia 172, c. 25 (Hening 1822).

When these areas were ceded to the Congress to be the "seat of government," their inhabitants continued to exercise their right of suffrage. 1 Stat. 139; 2 Stat. 103.

The City of Washington, from the time of its first charter until the enactment of the Temporary Organic Act of 1874, 18 Stat. 116, possessed the right of local suffrage. The Act of 1802, Incorporating the City of Washington, provided for an appointed mayor and an elected city council, 2 Stat. 195, ch. 53, I D.C. Code xxvii. Under the Act of 1812, Amending the Charter of Washington, the city government was composed of a board of aldermen and a board of common council, both elected, and a mayor, chosen by the aldermen and councilmen, 2 Stat. 721, ch. 75, I D.C. Code xxix. The Act of 1820, Reorganizing the Government of the City of Washington, retained the aldermen and councilmen, but provided for the popular election of the mayor (section 3),

3 Stat. 582, ch. 1043, I D.C. Code xxxiii. Under the Act of 1848 Reorganizing the Government of the City of Washington, the existing officers were retained, and the election of several other officials was provided for (sections 3, 4), 9 Stat. 223, ch. 42, I D.C. Code xxxvii. The Act of 1871 to Provide a Government for the District of Columbia established a bicameral legislative assembly with an elected house of delegates, 16 Stat. 419, ch. 62, I D.C. Code xlv-xlvi.

It is not without significance that the legislation which assured to the citizens of the District the right of municipal suffrage was adopted by a Congress whose members included twelve participants in the Constitutional Convention. See Annals of Congress, 7th Cong. 2nd Sess. p. 610, (1802). Cf. *Myers v. United States*, 272 U.S. 52, 136 evaluating the significance of the views of the First Congress in determining the power of the Executive.

The views of the Constitutional fathers regarding local suffrage are also illustrated in the treatment which they intended to be afforded to the inhabitants of territories. Compare Article IV, Section 3(2) of the Constitution with Article I, Section 8(17).

At the very moment of the writing of the Constitution, the Northwest Ordinances, adopted in 1784, 1785, and again in 1787, made local self-government the foundation stone of the political structure in the territories.

". . . The settlers on any territory . . . shall . . . receive authority . . . to meet together for the purpose of establishing a temporary government, to adopt the constitution and laws of any of the original states . . . to erect counties and townships for the election of members to the legislature..." Report for the Government of the Western Territory, Clarence E. Carter, The Territorial Papers of the United States (March 22, 1786).

Such also is the understanding of the Supreme Court. In *Clinton v. Englebrecht*, 80 U.S. 434; 441 in dealing with the rights of the inhabitants in the territories, the Supreme Court declared:

> "The theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants of all the powers of self-government consistent with the supremacy and supervision of the national authority and with certain fundamental principles established by Congress."

Cf. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 330-331. See also *Rasmussen v. United States*, 197 U.S. 516 and *Balzac v. Puerto Rico*, 258 U.S. 298. See *Stoutenburgh v. Hennick*, 129 U.S. 141, 147: "It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities" referring to "municipalities exercising local self-government."

And *Avery v. Midland County*, 390 U.S. 474, 481:

> "While state legislatures exercise extensive power over their constituents and over various units of local government, the States universally leave much policy and decision making to their governmental subdivisions. Legislators enact many laws, but do not attempt to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level. What is more, in providing for the governments of their cities, counties, towns, and districts, the States characteristically provide for representative government—for decision making at the local level by representatives elected by the people. And, not infrequently, the delegation of power to local units is contained in constitutional provisions for local home rule which are immune from legislative interference. In a word, institutions of local government have always been a major aspect of our system . . . ."

In this context, the observations regarding the District of Columbia which appear in *Downes v. Bidwell*, 182 U.S. 244, 260 are a forceful suggestion that the right of local self-government is protected by the 10th Amendment:

> "The District had been a part of the states of Maryland and Virginia. It had been subject to the Con-

> stitution and was part of the United States. The Constitution had attached to it irrevocably. . . The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution . . . If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants it would have been void; in other words, Congress could not do indirectly, by carving out the District, what it could not do directly . . . ."

When the land which now comprises the District of Columbia was ceded to the Congress, the Maryland Declaration of Rights applied to its people and provided:

> "That the right in the people to participate in the legislature is the best security of liberty, and the foundation of all free government; for this purpose elections ought to be free and frequent, and every man having property in, a common interest with, and an attachment to the community, ought to have a right of suffrage." See I D.C. Code, p. xx.

Manifestly, under the doctrine set forth in *Downes v. Bidwell, supra,* Congress would have been without the power to deprive the citizens of Georgetown, Maryland, of their local suffrage which they achieved prior to the cession. 2 Laws of Maryland, c. 23 (1789) (Kilty, 1800); I D.C. Code, pp. lxi-lxii. Yet after the cession, Congress did what *Downes v. Bidwell* says is forbidden. See Section 40, Act of 1871 Creating Legislative Assembly, 16 Stat. 419, D.C. Code, pp. xlv, xlix; and Temporary Organic Act of 1874, 18 Stat. 116, I D.C. Code, l-lii. The provisions of the Reorganization Plan which perpetuate the deprivation of local suffrage would appear equally to come within the proscription of *Downes v. Bidwell.* See also for the applicability of the 10th Amendment to political rights, *United Public Workers v. Mitchell,* 330 U.S. 75, 94-95 in which the Supreme Court treated "rights retained" under the Ninth Amendment as the equivalent of "powers reserved" under the Tenth Amendment. *Supra,* p. 10.

Significantly, this was the view of the minority report of the Joint Select Committee to Frame a Government for the District of Columbia, which drafted the Organic Act of 1878, 20 Stat. 102, I D.C. Code Lii-Lv, which resulted in the disfranchisement of the citizens of the District from 1878 to 1967:

> "It is assumed that the legislative power of Congress is a power absolute and unlimited . . . that the inhabitants of the District can have no right to participate in the exercise of that power . . . except such as may be delegated to them by Congress . . . .
>
> "It is the opinion of the minority that the power of Congress over the District . . . is legislative power; that is to say, the power to make laws and to provide for their enforcement . . .(but it) . . . does not imply that there are no practical or even legal limitations to its exercise. Absolute power in its unrestricted sense has no existence in America . . . . The powers of Congress are, in all cases, limited by the reserved rights of the people. . . .
>
> "The expressed rights, declared by the Constitution to be possessed by 'the people' are possessed by the people of the District. These are the personal rights and the rights of property. * * * These are any rights commonly possessed and enjoyed by citizens of the United States. They include the right of association for common purposes, the rights exercised in common of protecting property, of promoting the general convenience, of regulating the mutual concerns of an American community. They include the right of self-government.
>
> "The legislative power of Congress in the District is subject to these, and to other, limitations."

S. Rept. No. 572, 44th Cong. 2d Sess., Joint Select Committee to Frame a Government for the District of Columbia, January 11, 1877, pp. 14-15:

The materials set forth above, perhaps more extensively than need be in a petition for a writ of certiorari, surely suggest that a cause of action has been stated and that a

substantial constitutional question has been raised here as to the power of the people of the District of Columbia to retain the voice which they had prior to the adoption of the Constitution in the selection of their local government. The decision of the court below, which ignored this allegation, warrants review especially in the light of the holding of this Court in *Wesberry v. Sanders*, 376 U.S. 1.

6. The decision below should be examined also for the failure of the court below to heed the numerous decisions of this Court as to the function of the judiciary in dealing with the area of "protected freedoms."

When a state abridges "fundamental personal rights and liberties", this Court held in *Schneider v. State*, 308 U.S. 147, 161:

> ". . . courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

See also *Shelton v. Tucker*, 364 U.S. 479, 488 which ruled that although

> "the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

Similarly, *Griswold v. Connecticut*, 381 U.S. 479, 485, in dealing with a right to privacy held that a legislature may not regulate "by means which sweep unnecessarily broadly." See also *Zwickler v. Koota*, 389 U.S. 241, *United States v. Robel*, 389 U.S. 258, *Aptheker v. Secretary of State*, 378 U.S. 500, 514, *NAACP v. Alabama*, 377 U.S. 288, 307, and *Kent v. Dulles*, 357 U.S. 116, 125-127, 129.

The absence of any consideration by the court below of this often-stated principle of statutory construction especially as it is to be applied to the right of suffrage, the most fundamental of all, *Yick Wo v. Hopkins,* 118 U.S. 363, is the more remarkable in view of the decisions of this Court during the last term in *Shapiro v. Thompson,* 394 U.S. 618 and in *Kramer v. Union Free School District,* 391 U.S. 621.

In the former decision, this Court invalidated an act of Congress, relating to the District of Columbia, which imposed a residence requirement as a condition to obtaining a welfare benefit "unless shown to be necessary to promote a *compelling* governmental interest. . ." 394 U.S. at 634. In the latter case, this Court gave "close scrutiny" to a statute designed to limit the franchise for school board elections to those who are "primarily interested" in school affairs and held that the statute did not accomplish the "purpose with sufficient precision to justify denying" the right to vote to the appellant there. 395 U.S. at 633.

Neither *Hobson v. Tobriner* nor the opinion of the Court below indicate any scrutiny whatever to determine whether a "compelling interest" requires a denial of municipal suffrage to the citizens of the District of Columbia or whether, given an interest by Congress to exercise "complete authority at the seat of government" (The Federalist, No. 43, Madison), such authority may be achieved by "less drastic means" than by foreclosing to the citizens of the District of Columbia the right to choose the principal legislative and policy-making officers of their local government.

That the classifications which Congress has adopted for suffrage in the District of Columbia are indeed arbitrary and that they lack any justifiable governmental interest appear from even the most casual examination of the statutes which determine the areas of suffrage.

The citizens of the District are permitted to elect the electors of the President and Vice President of the United States, 23rd Amendment to the Constitution, D.C. Code Sec. 1-1101; the national and local committeemen of political

parties and the delegates to political conventions, D.C. Code, Sec 1-1101; and members of the Board of Education, ibid.

If, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment", *Harper v. Virginia Board of Education*, 383 U.S. at 685, is it not at least a substantial constitutional question whether lines are drawn as to the subject of the election which are violative of due process as the 5th Amendment applies to the District of Columbia? Compare *Bolling v. Sharpe*, 347 U.S. 497 and *Shapiro v. Thompson*, 394 U.S. 618.

The failure of the Court below to "consider the facts and the circumstances of the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification", *Williams v. Rhodes* 393 U.S. 23, 30, seems, without more, to be a sufficient basis to justify a summary reversal of the decision. See also *Reynolds v. Sims*, 377 U.S. 533, 562, and Point 2 above.

In any event, in the context of the prior grant of municipal suffrage, the failure of the court below to apply the principle set forth in *Schneider v. State*, 308 U.S. 147, 161, *supra*, raises an important question regarding the breadth of the limitation which can be placed upon suffrage. If Congress in the exercise of exclusive jurisdiction over the District of Columbia may deprive its inhabitants of municipal suffrage, may not a state legislature, in the exercise of its power to create municipal corporations, deprive the citizens of its cities the right to elect their municipal governments? This issue penetrates so deeply into the fabric of the American political structure that it surely impels examination by this Court, the more so because it is a power that the federal Congress has chosen to exercise over the inhabitants of the capital city of the country.

7. A final question as to the constitutionality of Sections 201(b) and 301(b) of Reorganization Plan No. 3 of 1967 is posed by *Kent v. Dulles*, 357 U.S. 116, 125-127, 129. While Section 7 of the Reorganization Act of 1949, 5 U.S.C.

902, specifically includes the municipal government of the District of Columbia as an agency subject to reorganization under the procedures specified, no language in that statute authorizes the deprivation of the right of suffrage. See 5 U.S.C. 901 *et seq.*

In *Kent*, the Supreme Court was concerned with a statute which similarly vested broad powers in the Executive, specifically that of granting passports under the Passport Act of 1926, 22 U.S.C. 211a. To the argument that Congress gave the Secretary of State "discretion to grant or withhold" a passport, the Supreme Court held:

> "Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. . . . [citing cases]. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen".

Plainly, the authority which the Congress had given the President to reorganize the government of the District of Columbia, although sufficient, without doubt, to substitute a Commissioner-Mayor and a nine-member Council for three commissioners and to distribute responsibilities between the two organs of municipal government, is not authority "to trench so heavily on the rights" of District citizens as to deny their right to elect these officials. See also *Schneider v. Smith*, 390 U.S. 17, in which the Supreme Court was "loathe to conclude that Congress", in granting authority to the President to safeguard vessels and waterfront facilities from sabotage, "undertook to reach into the First Amendment area."

Whether the Reorganization Act, any more than the statutes construed in *Kent v. Dulles* and *Schneider v. Smith*, should be interpreted to give power to the President to deprive the citizens of the District of Columbia of their right to choose by suffrage their Mayor-Commissioner and City Council members, should be examined by this Court.

II. As to jurisdiction

The decision below also raises important jurisdictional questions which bear upon the construction and applicability of 28 U.S.C. 2282 requiring a three-judge court when the constitutionality of an Act of Congress is challenged.[1]

1. The sole basis for the decision below that a three-judge court is not required to determine the complaint is that the constitutional claims presented are insubstantial, relying upon *Hobson v. Tobriner*, 225 F. Supp. (D.D.C.), petition for review for mandamus denied sub nom., *Hobson v. Gasch* (D.C. Cir. No. 20,838, without opinion), cert. denied, 386 U.S. 914.

The jurisdictional holding of the court below seems patently incorrect. *Bailey v. Patterson*, 369 U.S. 31, 33 and *Schneider v. Rusk*, 372 U.S. 224 establish that the standard for determining the nature of the constitutional claims presented is whether they are so "wholly insubstantial" as to be "legally speaking nonexistent" or when "prior decisions make frivolous any claim" that the statute is unconstitutional."

There are no prior decisions by this Court which make the petitioners' claims of unconstitutionality "frivolous." Compare *Schneider v. Rusk*, supra, 372 U.S. 224. The only other decisions by any court on any of the specific issues raised below are *Hobson v. Tobriner*, 255 F. Supp. 295 (D.D.C.), which, as noted supra at pp. 7-8, was rendered by that Court without the benefit of "briefs or oral argument" by the plaintiffs there, and *Carliner v. Board of Commissioners*, 265 F. Supp. 736, 738 (D.D.C., vacated as moot). The latter decision, which was shadowed by the former, is obviously of no effect, having been vacated. The former decision, even were to be given weight, is distinguishable because the

---

[1] The question posed in *Ex Parte Cogdell*, 342 U.S. 163, whether 28 U.S.C. 2282 applies to Acts of Congress pertaining only to the District of Columbia has been resolved in *Shapiro v. Thompson*, 394 U.S. 621, fn. 4 at 625, and although questioned below (App. p. 32), no longer appears in doubt.

plaintiffs there sought as relief the conduct of interim elections by the District Court and ultimate elections by the District Board of Elections, and were deemed to be seeking a political remedy. By contrast, petitioners here seek only to restrain the enforcement of certain provisions of Reorganization Plan No. 3 of 1967, a remedy plainly within the judiciary's competence.[2]

That the constitutional questions raised here, far from being "wholly insubstantial" and "legally speaking nonexistent," are of a most substantial character seems unarguable in the light of the materials set forth earlier in this petition. None of the recent decisions of this Court dealing with suffrage and apportionment are cited or adverted to in either the opinions of the Court below, of the District Court in *Hobson v. Tobriner*, or by the decision of the District Court below. The questions raised here have never been treated by the courts below.

The error below seems especially flagrant in the knowledge of the court below of the course in this Court of *Schneider v. Rusk*, 372 U.S. 224 and 377 U.S. 163. In the earlier *Schneider* decision, this Court reversed the District of Columbia Circuit affirming a refusal to convene a three-judge court by the District Court which had relied upon a prior holding by the Court of Appeals on the identical issue. If what would normally be a binding decision by the Court of Appeals on the same question did not preclude the convening of a three-judge court in *Schneider*, it is much less justified for the Court below to have disposed of the petitioners' claims solely upon the reliance of a distinguishable,

[2] Even were the *Hobson* decision an adverse judgment upon the identical questions raised here, a denial of a three-judge court there and the refusal of the Court of Appeals to grant mandamus and the subsequent denial of certiorari by this Court would not dispose of the issues here. Compare *Kramer v. Union Free School District*, 259 F. Supp. 164, (D.C. E.D. N.Y.), petition for writ of mandamus denied sub nom. *Davis v. Union Free School District*, 385 U.S. 807; reversed 379 F.2d 491; 282 F. Supp. 70; reversed 395 U.S. 621.

single-judge District Court decision which on its face failed to treat any of the questions raised here. This issue, which bears upon the standards by which a substantial constitutional claim are to be determined, is important to the uniform construction of the three-judge court statute and therefore deserves review by this Court. Cf. *Avery v. Midland County*, 390 U.S. 474, and *Kramer v. Union Free School District*, 259 F. Supp. 164 (D.C.E.D. N.Y.) denying an application for a three-judge court, reversed, 379 F.2d 491 (C.A. 2d Cir.); 282 F. Supp. 70 (D.C.E.D. N.Y.) (dismissing complaint), reversed, 395 U.S. 621.

2. An additional jurisdictional problem, not reached by the Court below, requires disposition by this Court. The substantial challenge here is directed to the constitutionality of Reorganization Plan No. 3 of 1967, an executive order, although to the extent that the Reorganization Act of 1949, 5 U.S.C. 902, precludes the adoption of a Reorganization Plan for the District of Columbia which permits local suffrage, the constitutionality of that Act also is "drawn into question".

The decisions of this Court as to the applicability of 28 U.S.C. 2282 to cases in which injunctions are sought to restrain executive orders indicate that the answer to the question here is not free from doubt.

Phillips v. United States, 312 U.S. 246, 250, 251, holds that the requirement for a three-judge court must be read narrowly and given strict construction. Thus it appears that where the substantial challenge is directed not to an Act of Congress, or in appropriate cases, to the statute of a state, but merely to administrative regulations, congressional resolutions, or executive orders, a three-judge court is not authorized. See *Jameson & Co. v. Morgenthau*, 307 U.S. 171, 173, 174; *Phillips v. United States, supra*, 312 U.S. 246, 253, 254.

This Court has also held that it is not enough to "draw an Act of Congress into question," but that there "must be a case where there is an application for an . . . injunction

to restrain the enforcement of an Act of Congress." See *International Ladies Garment Workers Union v. Donnelly*, 304 U.S. 243, 250. Cf. *Fleming v. Nestor*, 363 U.S. 603, and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144.

It is therefore arguable that a strict construction here would preclude the convening of a three-judge court to act upon the complaint here.

The force of this argument, based upon the holdings cited above, is considerably undermined, however, by the more recent decision in *Flast v. Cohen*, 392 U.S. 83. The petitioners there challenged the expenditure of federal funds for religious and sectarian schools, asking alternatively for a declaration that the expenditures "were not authorized by the Act," or if they are "deemed within the authority and intent of the Act, 'the Act is to that extent unconstitutional and void.' " They sought no injunction to restrain the Act, indeed "disclaiming any intent to challenge as unconstitutional all programs" under the relevant section of the statute, they sought an injunction solely to restrain "any expenditure of federal funds for . . . allegedly unconstitutional purposes," (at 87-88).

This Court regarded *Zemel v. Rusk*, 381 U.S. 1 as dispositive of the question. It ignored the absence of a request for an injunction to restrain the enforcement of an act of Congress and treated the request for an alternative declaration as presenting a constitutional and a non-constitutional ground for relief.

Petitioners are unable to distinguish the action here from that in *Flast*. If that holding of this Court is dispositive of the question, then the District Court below erred in dismissing the complaint, being without jurisdiction to do so, and the District of Columbia Circuit erred in affirming its dismissal. *Schneider v. Rusk*, 372 U.S. 224, supra.

In any event, the uncertainty which exists as to the effect of *Flast* upon challenges to executive orders, which are bottomed upon Acts of Congress, is an issue of continuing

importance in the judicial administration of the three-judge court statute and of sufficient moment here that further elucidation of the question by this Court seems in order.

CONCLUSION

For the reasons advanced, it is respectfully submitted that this petition for a writ for certiorari should be granted.

DAVID CARLINER
902 Warner Building
Washington, D.C.

HARRY HUGE
1823 Jefferson Place N.W.
Washington, D.C.

ARTHUR W. JACKSON
715 G Street, N.W.
Washington, D.C.

REUBEN ROBERTSON
2234 Decatur Place, N.W.
Washington, D.C.

Attorneys for Petitioners

Of Counsel:

RALPH TEMPLE
National Capital Area
Civil Liberties Education
and Defense Fund
1424–16th Street, N.W.
Washington, D.C.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,786

DAVID CARLINER, et al.,
Appellants

v.

COMMISSIONER OF THE DISTRICT OF COLUMBIA, et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia

Decided June 24, 1969

Mr. David Carliner, with whom *Messrs. Harry Huge, Arthur W. Jackson, Ralph Temple* and *Reuben Robertson* were on the brief, for appellants.

Mr. David P. Sutton, Assistant Corporation Counsel for the District of Columbia, with whom *Messrs. Charles T. Duncan,* Corporation Counsel, *Hubert B. Pair,* Principal Assistant Corporation Counsel, and *Richard W. Barton,* Assistant Corporation Counsel, were on the brief, for appellees.

Before FAHY, *Senior Circuit Judge,* McGOWAN and TAMM, *Circuit Judges.*

PER CURIAM: This appeal is from the grant by the District Court of appellees' motion to dismiss the complaint for failure to state a cause of action, cross-motions for summary judgment having been denied. Appellants are citizens of the District of Columbia who sued on behalf of themselves and all other such citizens to procure declaratory and injunctive relief. Appellees are the Mayor-Commissioner

and the members of the City Council appointed by the President pursuant to Section 301(b) of Reorganization Plan No. 3 of 1967. The complaint sought a declaration of the illegality of Reorganization Plan No. 3, and injunctions against the exercise by the individual appellees of any executive, legislative, regulatory, or rule making powers in the governance of the District of Columbia. It is said that the due process clause of the Fifth Amendment, and the Ninth and Tenth Amendments, of the Constitution dictate such relief because the citizens of the District have not been given the opportunity by popular vote to elect persons to the positions held by appellees.

During the course of oral argument, we raised the question of whether the appeal was properly before us, inasmuch as the case had not been heard in the first instance by a three-judge District Court. We invited supplemental memoranda on this question, which have been supplied. Appellants now tell us that, although the question is not an easy one, their matured reflections suggest that the complaint is within the scope of the requirements of Congress for three-judge courts, and they urge a remand with directions that one be convened. Appellees assert, contrarily, that no three-judge court is needed because the challenged statute is one local to the District. *But see Shapiro v. Thompson*, 37 U.S.L.W. 4333, 4335 n. 5 (U.S. April 21, 1969). They conclude that, in any event, a three-judge court need not be convened because the constitutional claims are insubstantial.

We find this last consideration compelling, and affirm the judgment of the District Court. *Hobson v. Tobriner*, 255 F. Supp. 295 (D.D.C. 1966), *petition for review for mandamus denied sub nom., Hobson v. Gasch* (D.C.Cir., No. 20,838, decided September 29, 1966), *cert. denied*, 386 U.S. 914 (1967).

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,786 September Term, 1968.

Civil Action 2885-67.

David Carliner, et al.,

Appellants,

Filed June 24, 1969

v.

Commissioner of the District
of Columbia, et al.,

Appellees.

Appeal from the United States District Court
for the District of Columbia

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam

For the Court:

Nathan J. Paulson
Clerk

Dated: June 24, 1969.

Opinion per curiam.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

David Carliner, et al.,

Plaintiffs

v. Civil Action No. 2885-67

Commissioner of the District of Columbia, and

District of Columbia Council, et al.,

ORDER

Upon consideration of the complaint filed herein, as amended, the motion of the plaintiffs for summary judgment and the motion of the defendants to dismiss the complaint or, in the alternative, for summary judgment, the memoranda of points and authorities cited in support thereof, and oral argument of counsel in open court on February 9, 1968, it is, by the Court this 19th day of February, 1968,

ORDERED:

1. That the motion of the defendants for summary judgment be, and the same is, hereby denied.

2. That the motion of plaintiffs for summary judgment be, and the same is, hereby denied.

3. That the motion of the defendants to dismiss the complaint, as amended, be, and the same is, hereby granted.

/s/ George Hart
Judge